

DOYLE LOWTHER LLP  
William J. Doyle II (188069)  
John A. Lowther (207000)  
James R. Hail (202439)  
9466 Black Mountain Road, Suite 210  
San Diego, California 92126  
Phone: (619) 573-1700  
Fax: (619) 573-1701  
www.doylelowther.com

ZELDES & HAEGGQUIST, LLP  
Amber L. Eck (177882)  
Helen I. Zeldes (220051)  
Alreen Haeggquist (221858)  
625 Broadway, Suite 906  
San Diego, California 92101  
Phone: (619) 342-8000  
Fax: (619) 342-7878  
www.zhlaw.com

*Interim co-lead counsel for plaintiffs and the proposed class*

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

In re Sony VAIO Computer  
Notebook Trackpad Litigation

Civil No. 09-CV-2109-BEN-RBB

**Lead Counsel's and Plaintiff  
Ronald Flynn's Reply in Support  
of Motion For Reconsideration**

Date: May 16, 2011  
Time: 10:00 a.m.  
Judge: Hon. Ruben B. Brooks  
Court: Courtroom B, First Floor

1 **I. Introduction**

2 Plaintiff Ronald Flynn and lead counsel file this reply in support of his  
3 motion to reconsider the Court's sanction order. Contrary to Sony's argument, the  
4 reconsideration motion was timely filed. Mr. Flynn, an elderly retiree living on a  
5 fixed income, does not have the money to pay the sanctions award the Court  
6 imposed. Plaintiff Flynn reiterates his request the Court either revoke or revise its  
7 sanctions ruling.  
8

9 **II. Plaintiff Flynn Filed a Timely Reconsideration Motion**

10 Sony first argues Mr. Flynn's motion for reconsideration was untimely. Sony  
11 Opp. at 4. The Court issued its sanction order on February 25, 2011. (Document No.  
12 59.) Plaintiff and defendant Sony agree that pursuant to Local Rule 7.1(i)(2), Mr.  
13 Flynn's application was due twenty-eight days later, on March 25, 2011.  
14

15 Mr. Flynn and lead counsel filed his motion for reconsideration on March 25,  
16 2011, and thus the application was filed within the time to seek reconsideration.  
17 (Document No. 61.) Four days later, the Court issued an order addressing the lack  
18 of a hearing date on the motion, and directed counsel to file the motion with its  
19 memorandum in a "separate document" as required by local rule. (Document No.  
20 62.) That same day, lead counsel refiled the same motion, but in the form the Court  
21 directed.  
22

23 Under Federal Rule of Civil Procedure 5(d)(4), a "document presented to the  
24 clerk in violation of a local rule of form can nonetheless be filed for purposes of  
25 satisfying a filing deadline." *United States v. Harvey*, 516 F.3d 553, 556 (7th Cir.  
26 2008). *Accord Contino v. U.S.*, 553 F.3d 124, 126-127 (2nd Cir. 2008) (electronic  
27  
28

1 filing of appeal timely even though paper filing was required and electronic filing  
2 was rejected); *Darouiche v. Fidelity Nat. Ins. Co.*, No. 10-30554, 2011 WL 777874, at  
3 \*2 (5th Cir. Mar. 7, 2011) (motion for new trial filed electronically was deemed  
4 “deficient” but nevertheless timely).

5  
6 Moreover, the Court “has the inherent power to reconsider and modify” its  
7 orders prior to the entry of judgment, no matter whether the order is “oral” or  
8 “written.” *United States v. LoRusso*, 695 F.2d 45, 53 (2nd Cir. 1982). Accordingly the  
9 reconsideration motion is timely.

### 10 **III. Plaintiff Flynn Cannot Pay The Sanctions Amount**

11  
12 Sony complains Mr. Flynn failed to pay the sanctions amount and argues  
13 that although Mr. Flynn’s business may be failing, Mr. Flynn should “personally”  
14 pay the sanctions amount. Sony Opp. at 7.

15 Mr. Flynn is 69 years old, subsists on a fixed income, and relies on a military  
16 disability pension to sustain he and his wife. Flynn Decl. ¶ 11. Mr. Flynn is  
17 struggling to survive in this economy. *Id.* at ¶ 11. Although Mr. Flynn is retired, to  
18 survive financially and to try to make ends meet, he maintains a solo real estate  
19 business without assistance or employees. Mr. Flynn’s declaration makes plain he  
20 has suffered, and continues to suffer, losses in the Florida real estate market. Flynn  
21 Decl. ¶ 11. Mr. Flynn revealed he lost money on his 2010 tax returns and disclosed  
22 his real negative cash flow in 2010 and 2011. Flynn Decl. ¶¶ 5, 12.

23  
24 Mr. Flynn and his wife, elderly retirees, cannot afford the \$5,002 sanction  
25 award. Flynn Decl. ¶ 11. They do not have the money. Flynn Decl. ¶¶ 7, 11. Indeed,  
26 Mr. Flynn is close to shuttering his business, since he does not have the money to  
27  
28

1 operate it. Mr. Flynn's declaration is clear: he cannot support his business because  
2 his fixed income does not support it. It bears repeating Mr. Flynn is an elderly  
3 retiree who was and is trying to survive financially, using real estate commission  
4 income, because his fixed income is insufficient. Flynn Decl. ¶ 11. But Mr. Flynn  
5 has earned only *de minimis* commissions of a couple thousand dollars the last  
6 couple of years, and in aggregate has sustained years of losses he cannot afford.  
7 These facts show Mr. Flynn does not have the money to pay the sanction. *Id.* at ¶¶  
8 7, 12.  
9

10  
11 Sony points to Mr. Flynn's "shareholder loans" as indicia of Mr. Flynn's  
12 ability to personally pay. Sony Opp. at 7. To the contrary, Mr. Flynn says he cannot  
13 afford the loans—he no longer has the cash available to sustain them. Flynn Decl. ¶  
14 7. Mr. Flynn's statements about his failed real estate transactions, income tax  
15 return losses, and bank account show the precarious state of Mr. Flynn's financial  
16 affairs. This is why it is just and proper for the Court to revoke the sanctions award.  
17

#### 18 **IV. Plaintiff Flynn's Reconsideration Motion Should Be Granted**

19 Sony argues Mr. Flynn fails to present any "newly discovered evidence" and  
20 argues the evidence does not "support a different outcome." Sony Opp. at 5-7. Sony  
21 also complains Mr. Flynn was aware of his "financial situation" in January 2011,  
22 and such information should have been included in his opposition to the order to  
23 show cause.  
24

25 The correct standard here under Federal Rule of Civil Procedure Rule 60 is  
26 reconsideration may be based upon "any ... reason justifying relief from the  
27 operation of the judgment." *Martin v. County of San Diego*, 650 F. Supp. 2d 1094,  
28

1 1111 (S.D. Cal. 2009). Contrary to Sony’s opposition, application for reconsideration  
2 may include new or different facts which “were not shown” upon the prior  
3 application. Local Rule 7.1(i)(1)(3). Thus the Federal Rules, case law, and the local  
4 rules allow Mr. Flynn and the Court to review the additional facts and consider his  
5 financial circumstance in revisiting the sanctions award.  
6

7 Only after the Court issued its February 25, 2011 order was Mr. Flynn  
8 apprised of the actual sanction amount—and in particular, the requirement that  
9 Mr. Flynn personally pay the sanction without contribution from counsel. The  
10 instant motion allows Mr. Flynn to ask the Court to revoke or revise its sanctions  
11 Order, including advising the Court of his precarious finances and his inability to  
12 personally pay the sanction.  
13

14 The “ability of a party to pay is one factor a court should consider when  
15 imposing sanctions,” *Gaskell v. Weir*, 10 F.3d 626, 629 (9th Cir. 1993), which  
16 consideration Mr. Flynn asks the Court to undertake. Further, the Ninth Circuit  
17 has also held the Court has the discretion to conduct such evaluation “in camera,”  
18 *Enercon GmbH v. Erdman*, No. 00-15399, 2001 WL 777476, at \*2 (9th Cir. 2001),  
19 and as Mr. Flynn said in his declaration, he is willing to make his financial  
20 statements available to the Court for such a review. An elderly couple surviving on  
21 a fixed income, and using a military disability pension to sustain them, are facts the  
22 Court can and should consider in reviewing its sanctions award. *See* February 25,  
23 2011 Sanctions Order, at 8 (“Nothing in the record suggests that Plaintiff Flynn is  
24 financially unable to pay these amounts.”).  
25  
26

27 Finally, Mr. Flynn’s declaration includes details of his commitments and the  
28

fact he did review flight times and schedules. But as Mr. Flynn says, he kept his commitments to “save his real estate business.” Flynn Decl. ¶ 8.

## V. Conclusion

Lead Counsel requests the Court reconsider its imposition of personal sanctions against Mr. Flynn, and the amount of sanctions, and reconsider the February 25, 2011 award in light of Mr. Flynn’s financial condition and effort to save his failing business.

DATED: May 9, 2011

DOYLE LOWTHER LLP

**s/ John A. Lowther**

Attorney for Plaintiffs

email: john@doylelowther.com

William J. Doyle II (188069)

bill@doylelowther.com

John A. Lowther (207000)

john@doylelowther.com

James R. Hail (202439)

jim@doylelowther.com

9466 Black Mountain Road, Suite 210

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ZELDES & HAEGGQUIST, LLP

Amber L. Eck (177882)

ambere@zhlaw.com

Helen I. Zeldes (220051)

helenz@zhlaw.com

Alreen Haeggquist (221858)

alreenh@zhlaw.com

625 Broadway, Suite 906

San Diego, California 92101

Tel: (619) 342-8000

Fax: (619) 342-7878

*Interim co-lead counsel for plaintiffs and the proposed class*